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March 30, 2012

Anne-Marie Pastorkovich  
Fuels Compliance Center  
Compliance Division  
Office of Transportation & Air Quality  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N. W.  
Mail Code: 6406J  
Washington, DC 20460

RE: FOIA Request HQ-FOI-02231-11; Comments on Request regarding Confidential  
Business Information Claims

Dear Ms. Pastorkovich:

In letters dated February 13 and March 1, 2012, EPA notified biodiesel companies whose information is potentially subject to disclosure in response to FOIA Request HQ-FOI-02231-11 that it is seeking comment on confidentiality claims related to that information. *The National Biodiesel Board (NBB) is submitting these comments in support of claims that certain information regarding biodiesel production and sales reported under the Renewable Fuel Standard program constitutes confidential business information (CBI) and thus is exempt from disclosure under the Freedom of Information Act (FOIA).*

NBB is the national trade association representing the biodiesel industry, and its membership is comprised of biodiesel producers; state, national, and international feedstock and feedstock processor organizations; fuel marketers and distributors; and technology providers. NBB is aware that numerous companies have claimed the information potentially subject to disclosure under FOIA Request HQ-FOI-02231-11 constitutes CBI and several have sought or will seek to substantiate their CBI claims in response to EPA's letters. NBB is submitting these comments on behalf of its members. Even if some biodiesel producers or obligated parties waive their CBI claims either expressly or by default, release of the information generally can affect the industry as a whole and release of information even only for those waiving their claims can still undermine the CBI claims of others. As such, NBB requests EPA carefully consider the CBI claims raised and make a general determination that the information is considered CBI, as opposed to making such determination on a company-by-company basis.

I. FOIA Request HQ-FOI-02231-11 and EPA's Proposed Disclosures

In September of 2011, EPA received a request for information related to biomass-based diesel Renewable Identification Numbers (RINs) generated and used for compliance under the Renewable Fuel Standard pursuant to FOIA -- FOIA Request HQ-FOI-02231-11. Specifically, the FOIA request seeks:

- (1) A listing of all companies that are generating, or have generated, RINs for biomass-based diesel under the RFS2 program since its inception;

- (2) The number of RINs for biomass-based diesel generated by each of these companies under the RFS2 program since its inception, identified/listed by production or importation and year; and
- (3) The names of obligated parties and the number of RINs identified/listed by production year for biomass-based diesel fuel that have been retired by each of the obligated parties since the inception of the RFS2 program.

On February 21, 2012, NBB had a conference call with EPA seeking clarification of the records covered by the request. In a letter dated March 1, 2012, EPA provided a sample response to illustrate what the FOIA requester would actually receive (Attachment A).

For its response to Items (1) and (2) above, EPA proposes to identify each biodiesel company by name and the total number of biomass-based diesel RINs generated by that company through production or importation for each year of the program (*i.e.*, 2010 and 2011). Since RINs are directly related to volumes, EPA essentially will be disclosing annual production and import volumes for each biodiesel producer, which is considered CBI by the companies and is not otherwise publicly available except on an aggregate basis for the industry as a whole.<sup>1</sup>

For its response to Item (3), EPA intends to provide, for example, the following information:

<u>Obligated Party Name</u>	<u>RIN Generator Name</u>	<u>RIN Production Year</u>	<u>RIN Total</u>
Obligated Party A	Biodiesel Producer A	2010	98,765

The inclusion of the second column in response to this request alone and in conjunction with the last column includes and reveals business information also of biodiesel producers, including potentially identifying customers and annual sales to those customers, which are generally kept confidential between the buyer and seller of the biodiesel and associated RINs. The proposed table reveals information that can be used by competitors within the industry, but also presents substantial harm to the biodiesel industry as a whole, which faces competition from other advanced biofuels. NBB also believes that linking the obligated party to the RIN generator (*e.g.*, biodiesel producer) and identifying the number of RINs from that biodiesel producer falls outside the FOIA request. Moreover, FOIA Request HQ-FOI-02231-11 only asks for the “number of RINs identified/listed by production year for biomass-based diesel fuel that have been retired” by the obligated party, not the party generating such RINs. Thus, NBB believes EPA’s proposed response to Item (3) is inappropriate.

## II. EPA Should Determine the Information Related to Biodiesel Facilities is CBI and is Exempt from Disclosure

Under FOIA Exemption 4, commercial or financial information obtained from a person that is privileged or confidential (*i.e.*, CBI) is exempt from public disclosure. 5 U.S.C. § 552(b)(4). The purpose of Exemption 4 “is to protect persons who submit confidential financial or commercial data from competitive disadvantages that would result from disclosure.” *Greenberg v. Food & Drug Admin.*, 803 F.2d 1213, 1216 (D.C. Cir. 1986) (citation omitted). The exemption is also intended to assist the government to ensure it is able to obtain the information needed to make regulatory decisions. *Critical Mass Energy Project v. Nuclear*

<sup>1</sup> EPA provides EMTS data on the total number of biomass-based diesel RINs generated in the aggregate, which NBB supports. NBB also generally supports transparency in the program. NBB’s concerns, however, stem from EPA’s proposal to release specific information for individual biodiesel companies in response to this FOIA request.

*Regulatory Comm'n*, 975 F.2d 871, 873 (D.C. Cir. 1992). Both of these purposes support EPA withholding the specific information regarding biodiesel companies pursuant to Exemption 4 under FOIA.

CBI is exempt from disclosure if: (1) the business has satisfactorily shown that disclosure of the information is likely to cause substantial harm to the business's competitive position; or (2) the information is voluntarily submitted information, and its disclosure would be likely to impair the Government's ability to obtain necessary information in the future. 40 C.F.R. § 2.208; *see also Critical Mass Energy Project*, 975 F.2d at 878 (citation omitted). It is important to note that a showing of actual harm is not required to maintain a CBI claim. *See Timken Co. v. U.S. Customs Serv.*, 491 F. Supp. 557, 559 (D.D.C. 1980) (citations omitted). Rather, a likelihood of substantial competitive injury can be found by demonstrating that disclosure of the information would provide competitors with valuable insights into a company's operations, give competitors pricing advantages over the company, or unfairly advantage competitors in future business negotiations.

First EPA must consider whether the submission of the information is mandatory or voluntary. Although EPA's regulations require the covered information to be submitted to EPA, the Renewable Fuel Standard is an incentive program designed to promote the use of renewable fuel, and participation by renewable fuel producers is not required. In establishing the program, Congress sought "to increase the production of clean renewable fuels" to promote "among other things, the nation's security, ... a 'matter ... of interest to every citizen' ...." *NPRA v. EPA*, 630 F.3d 145, 156 (D.C. Cir. 2010). The Clean Air Act itself does not require renewable fuel producers to produce fuel under the renewable fuel program, nor does it require this information be disclosed. Rather, EPA established the RIN as the means of tracking compliance with the Renewable Fuel Standard program, placing the burden on renewable fuel producers to generate RINs. As part of its compliance program, EPA requires renewable fuel producers to register and submit numerous reports to participate in the program.<sup>2</sup> Because of the potential adverse impacts the disclosure of this information may have, EPA should nonetheless consider the impacts of release of this information on EPA's ability to obtain necessary information in the future. The revised program was also intended to diversify feedstock and improve the rural economy. S. Rep. No. 110-65 at 2-3 (2007). Release of this information as proposed by EPA could have significant adverse impacts on the biodiesel market and on companies, particularly smaller companies that would undermine these purposes.

In any event, since the information is required to be submitted under EPA's regulations, it can be shown that the disclosure of the information is likely to cause substantial harm to competition in the biodiesel industry. Biodiesel sales are the result of negotiations on volumes and prices based on, among other things, feedstock, production costs, and transportation costs. In order to protect price points and marketing strategies utilized by each company, it is industry practice on the part of both biodiesel producers and their customers, including marketers and obligated parties, to keep negotiated terms confidential. The information EPA has indicated it seeks to disclose under this FOIA Request can reveal these contract terms that otherwise are kept confidential, and can be used by competitors to their advantage including: (1) annual volumes of production and imports; (2) sales volumes; and (3) customer lists.<sup>3</sup> As such, each of these constitutes CBI, and the release of this information can result in significant competitive harm.

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<sup>2</sup> The D.C. Circuit has found that no provision of FOIA "obliges agencies to exercise their regulatory authority in a manner that will maximize the amount of information that will be made available to the public through that Act." *Critical Mass Energy Project*, 975 F.2d at 880.

<sup>3</sup> FOIA Request HQ-FOI-02231-11 also seeks names of renewable fuel producers that have generated biomass-based diesel RINs and of obligated parties submitting biomass-based diesel RINs for compliance purposes. EPA

For Item 2 under the FOIA Request, EPA proposes to release the total amount of biomass-based diesel RINs generated based on production and importation by each company for each year of the program. Based on this information, annual sales volumes of biodiesel production and imports can be estimated by dividing RINs by the 1.5 equivalence value established for biodiesel. Based on information that may be available regarding the identified companies (e.g., location, feedstock, capacity, etc.), competitors can utilize the information disclosed by EPA to compare against estimated production costs and trace gallon prices. In this way, competitors, including producers of other advanced biofuels, and customers can estimate profit margin and production costs, thereby giving competitors insight into a company's competitive strengths and weaknesses. See *Lion Raisins v. U.S. Dept. of Agriculture*, 354 F.3d 1072, 1081 (9th Cir. 2004); see also *NRDC v. Leavitt*, No. 04-01295, 2006 WL 667327 (D.D.C. Mar. 14, 2006) (affirming EPA's withholding of individual companies' pesticide stockpile information as CBI).

The potential impacts on competition in the biodiesel industry of the release of this information is particularly acute when considered in conjunction with the sales volumes and customer identification EPA also proposes to provide in response to Item 3 of the FOIA Request. Release of the information as proposed by EPA would give competitors insight into the marketing strategy of other companies including pricing structure, allowing the competition to outbid them or force a reduction in profit margins. The identification of the RIN generator and number of RINs obtained from each can help competitors identify biodiesel producers' customers and the terms of sales entered into by these companies. This is particularly true for smaller, localized companies where production costs may be easier to estimate, or for particular customers who may have certain specifications they require for their products. Tracking this information over time, as proposed by EPA even if only for 2010 and 2011, can also provide competitors insights into marketing plans, including potential growth areas.<sup>4</sup> Every linkage of information would allow competitors to undermine their competitors' marketing strategies at very little cost.

It is general practice in the industry to keep this type of business information confidential, and such information is not otherwise reasonably attainable without the consent of the companies.<sup>5</sup> In particular, terms of sales are exclusively maintained between the buyer and seller, even in the case where producers use marketers to sell their biodiesel products. Many companies restrict access to sales information to a limited number of employees, and many companies utilize computer programs for tracking sales and production volumes and restrict access to this data. In addition, many companies include confidentiality provisions in their sales contracts. While the specific practices each company engages in to maintain such confidentiality may differ, it is generally accepted in the industry that such information should not be disclosed outside the buyer/seller relationship.

Biodiesel producers also have been provided assurances by EPA regarding maintaining the confidentiality of the information submitted for purposes of the RFS program. EPA has

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already provides a list of companies registered under the Renewable Fuel Standard program, including biodiesel producers and obligated parties, on its website. NBB does not contest the release of names of those companies participating in the program.

<sup>4</sup> Although only covering 2010 and 2011, EPA's determination as to whether this information constitutes CBI can have precedential effect, and such release will surely result in further requests by other competitors and new market entrants, including new fuels seeking to compete for the advanced biofuel market.

<sup>5</sup> Although NBB receives annual production volumes from its members, NBB is expressly limited in how it can use such information without the consent of its members. In particular, NBB cannot disclose such information to third parties, and does not provide information specific to a particular member to other members.

required companies submit information regarding RIN generation and RIN transactions to track compliance, but has instituted a system that it asserted, among other things, “[i]mproves security and transmission of confidential business information (CBI) through registration and authentication.” EPA, *CDX Benefits*, <http://www.epa.gov/cdx/benefits/index.htm> (last updated January 24, 2012). Access to these programs is limited to EPA and its contractors, and transaction information remains available only to the buyer and seller. EPA has indicated that it has employed procedures, “including comprehensive system security plans (SSPs),” to protect the CBI from unauthorized disclosure. 75 Fed. Reg. 35,451 (June 22, 2010). While EPA does provide access to its contractors on a “need-to-know” basis, EPA also has required its contractors to “sign written non-disclosure agreements before they are granted access to data.” *Id.* EPA, thus, has already recognized the sensitive nature of such information, particularly with respect to future production plans. Regarding the required Production Outlook Reports, EPA stated that “[a]ll information submitted to EPA will be treated as confidential business information (CBI), and if used by EPA in a regulatory context will only be reported out in very general terms.” 75 Fed. Reg. 14,670, 14,730 (Mar. 26, 2010). Thus, participants in the program relied on EPA’s assurances that it would take efforts to maintain the confidentiality of information submitted.<sup>6</sup>

Other agencies also have recognized the confidential nature of this type of information, and takes efforts to only report data related to biodiesel production in the aggregate. For example, the Confidential Information Protection and Statistical Efficiency Act, Pub. Law No. 107-347, Title V, protects information collected for statistical purposes from improper disclosure and requires agencies to ensure that the information is not used for nonstatistical purposes, including disclosure under FOIA. Recognizing confidentiality concerns even when information is provided in the aggregate, agencies, such as the U.S. Census Bureau, will not publicly disclose production statistics if individual company’s information can be reasonably ascertained. EPA should similarly retain specific company information confidential.

### III. Any Disclosure by EPA Regarding Specific Company Information Could Impact the Claims of Others and, Therefore, EPA Should Not Disclose Information Even in the Event of a Waiver.

NBB is aware that numerous companies have asserted the information to be CBI. While it believes all biodiesel companies would have asserted CBI on some or all of the reports from which EPA obtained this information, not all companies will have the resources or ability to substantiate their claims in response to EPA’s February 13 or March 1 letters. Failure to respond, however, automatically constitutes a waiver of such claims. Nonetheless, the proposed release of information affects the biodiesel industry as a whole and can have significant impacts on competition. Moreover, the claims of some companies should not undermine the claims of others. As such, NBB is providing additional information on the industry as a whole to inform EPA’s determination as to whether the information generally constitutes CBI. To the extent necessary, NBB is making this request pursuant to 40 C.F.R. § 2.207, which grants EPA authority to make a class determination with respect to the information regarding biodiesel production and sales.

Although EPA has authority to provide information in response to a FOIA request when there is a waiver, if EPA only discloses the names of those companies that have expressly waived or waived their claims by default, such information can still undermine the CBI claims of those companies that have not made such a waiver and whose names EPA agrees not to disclose. “Whenever the claims of two or more businesses apply to the same information, the EPA legal

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<sup>6</sup> In public comments on the proposed rule, numerous comments disputed EPA’s need for much of the information it proposed to require under the Renewable Fuel Standard program based on confidentiality concerns.

office shall take action appropriate under the particular circumstances to protect the interests of all persons concerned (including any person whose request for the information is pending under 5 U.S.C. 552).” 40 C.F.R. § 2.205(d)(3). Moreover, it is unclear what information EPA will withhold for those companies that do seek to retain their CBI claims. If EPA still lists the number of RINs and just leaves the names blank, a competitor would likely be able to identify the other unnamed biodiesel producers, particularly for those companies that have larger production capacity.

Finally, the release of this information for some companies but not others would disadvantage those companies that may not have the resources available to respond to EPA’s request. As described above, annual production volumes can be used to obtain highly confidential business information about a competitor. This could result in the ability of competitors to adjust their pricing to drive these companies out of business.

Thus, EPA should make a determination that specific information with respect to individual biodiesel companies is entitled to confidential treatment under FOIA. EPA can make a class determination because (a) it has a large volume of information it obtains under the Renewable Fuel Standard, (b) the data provided by biodiesel producers is of the same character and it is appropriate to treat all the information similarly, and (c) a class determination will serve a useful purpose by simplifying EPA’s responses to FOIA requests. EPA also should make clear that, to the extent it determines the information can be disclosed, any such determination is limited to the specific information being disclosed and will have no effect on any other information submitted by biodiesel producers under the Renewable Fuel Standard.

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NBB appreciates EPA’s consideration of these comments. As previously indicated, NBB generally supports transparency in the Renewable Fuel Standard program and efforts to ensure RIN integrity, but believes the information EPA proposes to disclose and the form in which it intends to do so presents substantial risks to the biodiesel industry without providing benefit to ensuring compliance with the program. NBB remains willing to discuss with EPA how best to provide information to the public to ensure a practical and effective program. If you have questions or comments, then please do not hesitate to contact Larry Schafer at [Lschafer@biodiesel.org](mailto:Lschafer@biodiesel.org) or at 202.737.8801.

Sincerely,



Anne Steckel  
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National Biodiesel Board